UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER SANTOS,	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 3:04 CV 350 (CFD)
	:	
PRAXAIR SURFACE TECHNOLOGIES, INC,	:	
Defendant.	:	

RULING ON MOTION TO DISMISS

Plaintiff Christopher Santos brought this action in the Connecticut Superior Court against his former employer, Praxair Surface Technologies, Inc. ("Praxair"). Santos' complaint contains nine counts. Count One alleges that Praxair violated the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-51 et seq. Count Two alleges that the defendant and its employees conspired to deny Santos a continuing employment relationship with Praxair, in further violation of CFEPA. Count Three alleges that Praxair violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., while Count Four alleges that the employer violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 591 et seq. Count Five alleges that Praxair discriminated against and wrongfully terminated Santos on the basis of his medical condition, in violation of Connecticut common law. Count Six alleges that Praxair retaliated against Santos for attempting to exercise his rights under the Connecticut Family and Medical Leave Act, Conn. Gen. Stat. § 31-51kk et seq. Counts Seven and Eight allege the Connecticut common law torts of negligent and intentional infliction of emotional distress. In Count Nine, Santos claims that he was constructively discharged by Praxair in violation of

Connecticut common law.

Defendant Praxair removed the action to this Court pursuant to 28 U.S.C. § 1441.[1] Praxair has now filed a motion to dismiss Counts Two, Five, Six, and Nine of the plaintiff's complaint under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

I. Background[2]

Christopher Santos, a man of Puerto Rican descent, was employed by Praxair Surface Technologies from August 1996 through December 2001. During that time, Santos suffered a visible disability in that he had a pronounced limp.

Santos claims that throughout his employment with Praxair, he was subject to discriminatory disparate treatment on the basis of his race and disability. The alleged discrimination included Santos' not receiving training at the same level as other employees, being the object of racially hostile comments from Praxair supervisors, being unfairly reprimanded for his work performance, being unfairly demoted, and being denied disability leave on one occasion.

Praxair terminated Santos in December 2001, for the stated reason that Santos was "receiving [Praxair] short term disability benefits while claiming to be disabled but simultaneously working for another employer." Complaint at ¶ 39. Santos claims that his termination actually was motivated by illegal racial and disability discrimination.

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[1] The Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

[2] These assertions are taken from the plaintiff's complaint.

II. Standard of Review

When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale-New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, the Court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

III. Discussion

The challenged counts of the plaintiff's complaint will be evaluated in turn.

A. Count Two: Conspiracy to Violate the CFEPA

In Count Two of his complaint, Santos alleges that Praxair and several of its supervisory employees conspired to deny him continued employment in violation of CFEPA.[3] Praxair argues that Connecticut law establishes that a corporation can not conspire with its employees, and therefore the count must be dismissed.

The Connecticut Supreme Court has explained that, under the state's intracorporate conspiracy doctrine, "employees of the same corporate entity cannot conspire with one another or with the corporate entity as long as their alleged acts are within the scope of their employment." Harp v. King, 835 A.2d 953, 266 Conn. 747, 751 n.5 (2003). An employee is deemed to be acting within the scope of his employment "as long as he is discharging his duties or endeavoring to do his job, 'no matter how irregularly, or with what disregard of instructions.'" Id. at 786 (citing Ierardi v. Sisco, 119 F.3d 183, 187 (2d Cir. 1997)). To fall outside the intracorporate conspiracy doctrine, an employee's allegedly wrongful conduct "must be in furtherance of personal considerations unrelated or extraneous to the corporation's interest." Id. at 782.

Here, the plaintiff has not alleged which, if any, of the supervisory employees' actions meet the above standards and may be considered to have occurred outside the scope of employment. When the allegations involve only one corporate entity acting through its employees, no conspiracy claim can stand. See Natale v. Town of Darien, 1998 U.S. Dist. LEXIS 2356, *16 (D. Conn. Feb. 26, 1998). Because the plaintiff has failed to allege any extracorporate activity, the intracorporate conspiracy doctrine applies. The Court grants

[3] Santos has not named these supervisors as defendants.

Praxair's motion to dismiss Count Two of the complaint.[4]

B. Count Five: Common-Law Wrongful Discharge

In Count Five, Santos alleges that Praxair wrongfully terminated him because of various medical conditions that he suffered. Generally, Connecticut follows the rule that employment is at-will and terminable by either the employee or the employer for any reason. Fisher v. Jackson, 118 A.2d 316,142 Conn. 734, 736 (1955). The Connecticut courts have recognized an exception to that rule, however, and allow that an employee may recover for wrongful discharge where he "can prove a demonstrably *improper* reason for dismissal, a reason whose impropriety is derived from some important violation of public policy." (Emphasis in original.) Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 179 Conn. 471, 475 (1980).

A common-law wrongful discharge action is disallowed, however, where the plaintiff has an available statutory remedy. See Burnham v. Karl & Gelb, P.C., 745 A.2d 178, 252 Conn. 153, 162 (2000) (holding that statutory remedy set forth in Conn. Gen. Stat. § 31-51(b) precluded common law wrongful discharge claim); see also Mauro v. Southern New England Telephone, 208 F.3d 384, 388 n.3 (2d Cir. 2000) (noting the relevant rule in Connecticut); Swihart v. Pactiv Corp., 187 F. Supp. 2d 18, 25 (D. Conn. 2002) (applying Burnham rule to claim for wrongful discharge). The limitation on Sheets-based actions has been explained as follows:

> [I]t is evident that the Connecticut Supreme Court in Sheets did not intend to create a means for discharged employees to assert the same statutory or constitutional violations twice in a single complaint or to circumvent the procedural requirements of the state human rights statutes. Instead, the court intended merely to provide "a modicum of judicial protection," for those who did not already have a means of challenging their dismissals under state law.

[4] Praxair, of course, may be independently liable for violating the CFEPA as alleged in Count One of the complaint.

Banerjee v. Roberts, 641 F. Supp. 1093, 1108 (D. Conn. 1986) (quoting Sheets, 179 Conn. at 477).

In the instant case, the plaintiff has raised additional claims under CFEPA, the ADA, and the Rehabilitation Act of 1973 for his allegedly wrongful termination. Because the plaintiff may obtain a remedy under any of these statutory schemes, his common law wrongful discharge claim is preempted. See Medvey v. Oxford Health Plans, 313 F. Supp. 2d 94, 99 (D. Conn. 2004).

Therefore, the Court grants Praxair's motion to dismiss Count Five of the complaint.

C. Count Six: Violations of the Connecticut Family and Medical Leave Act

In Count Six, Santos alleges that Praxair denied him his rights under the Connecticut Family and Medical Leave Act ("CFMLA"), Conn. Gen. Stat. § 31-51kk et seq., and retaliated against him for attempting to exercise those rights. In response, Praxair argues that this count must be dismissed for Santos' failure to exhaust administrative remedies, as is required by the statute.

Judges in the District of Connecticut previously have examined the CFMLA and its associated regulations and concluded that "exhaustion of administrative remedies is required under the CFMLA prior to judicial action being initiated." Persky v. Cendant Corp., 114 F. Supp. 2d 105, 107 (D. Conn. 2000); see also Abbate v. Cendant Corp., 2004 U.S. Dist. LEXIS 11546, *5 (D. Conn. Jun. 23, 2004) (holding same). The exhaustion requirement means that a plaintiff seeking to litigate a claim under the CFMLA must first file a complaint with the Connecticut Labor Department and seek relief through the state's administrative process.[5] See

[5] Santos alleges that his CFMLA retaliation claim is not subject to the exhaustion requirement, but this is unsupported by the statute. Under Conn. Gen. Stat. § 31-51pp, it is illegal for an employer to interfere with, restrain, or deny an employee from exercising his rights

Persky, 114 F. Supp. 2d at 106-07; see also Conn. Agencies Regs. § 31-55qq-43.

Santos has not alleged that he filed any complaint with the Labor Department, nor has he otherwise claimed to have exhausted his administrative remedies under the CFMLA. A plaintiff's failure to exhaust administrative remedies deprives the Court of subject matter jurisdiction over the affected claim. See, e.g., Niagara Mohawk Power Corp. v. FERC, 306 F.3d 1264, 1270 (2d Cir. 2002); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002). Therefore, the Court dismisses Count Six of the plaintiff's complaint.

D. Count Nine: Common-Law Constructive Discharge

In Count Nine of his complaint, Santos alleges that Praxair's failure to eliminate workplace discrimination against him constituted a constructive discharge of his employment in violation of Connecticut common law. Praxair has moved to dismiss this count of the complaint on the ground that Connecticut does not recognize an independent cause of action for constructive discharge.

A constructive discharge is treated as the legal equivalent of a discharge. Seery v. Yale-New Haven Hosp., 554 A.2d 757, 17 Conn. App. 532, 540 (1989). Like a wrongful actual discharge, however, a wrongful constructive discharge is only actionable if it violates public policy under the criteria set forth in Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 179 Conn. 471, 475 (1980). See Kilduff v. Cosential, Inc., 289 F. Supp. 2d 12, 18 (D. Conn. 2003). If a plaintiff has other statutory remedies available to redress the public policy violation underlying

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under the CFMLA, as well as for an employer to discharge or discriminate against an employee who does exercise such rights. See Conn. Gen. Stat. § 31-51pp(a)(1)-(2). This latter provision of the statute encompasses retaliation claims such as that raised by Santos. No matter the precise nature of the CFMLA violation, an aggrieved employee raising any claims under this subsection must first "file a complaint with the [Connecticut] Labor Commissioner . . . ." § 31-51pp(c)(2).

the constructive discharge, then he may not bring an additional independent cause of action for the discharge itself. See id. at 18-19; see also Discussion, Section III.B, supra.

As stated previously, the plaintiff already has raised claims that his termination violated the CFEPA, the ADA, and the Rehabilitation Act of 1973. Because those statutory schemes provide him remedies for discriminatory discharge, his common-law constructive discharge claim is precluded. The Court therefore dismisses Count Nine of the complaint.

IV. Conclusion

The Court GRANTS Defendant's Motion to Dismiss [Doc. # 10]. The remaining counts in the complaint are: Count One, alleging violations of the CFEPA; Count Three, alleging violations of the ADA; Count Four, alleging violations of the Rehabilitation Act of 1973; and Counts Seven and Eight, alleging the common law torts of negligent and intentional infliction of emotional distress.

So ordered this __31st__ day of March 2005 at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE